

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of new rule)
I pertaining to nutrient standards)
variances)
)
) NOTICE OF PUBLIC HEARING ON
PROPOSED ADOPTION
(WATER QUALITY)

TO: All Concerned Persons

1. On _____, 2014, at _____.m., the Department of Environmental Quality will hold a public hearing [in/at address], Montana, to consider the proposed adoption of the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., _____, 2014, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

3. The proposed new rule provides as follows:

NEW RULE I NUTRIENT STANDARDS VARIANCES (1) A person may apply to the department for a nutrient standards variance from base numeric nutrient criteria at any time following the board's adoption of base numeric nutrient criteria. In addition to this rule, variances are subject to the procedures and requirements contained in Department Circular DEQ-12B (December 2013 edition).

(2) An application for a general variance must provide information demonstrating that the wastewater treatment facility meets the requirements of 75-5-313(5)(b), MCA, or updated concentrations subsequently adopted by the department. The decision to grant the general variance must be reflected in the permit that is made available for public comment.

(3) An application for an individual variance must adequately demonstrate that there are no reasonable alternatives that eliminate the need for a variance and that attainment of the base numeric nutrient criteria is precluded due to economic impacts or limits of technology, or both. If the demonstration relies upon economic impacts, the department shall consider any guidance developed by the department and the nutrient work group, as provided in 75-5-313(2), MCA.

(4) The department may approve the adoption of an individual variance that specifies interim effluent limits different from those contained in 75-5-313(5)(b), MCA, or rules that modify those limits, if water quality modeling demonstrates that greater emphasis on the reduction of one nutrient may achieve similar water quality and biological improvements as would the reduction of both nitrogen and phosphorus. The variance must provide effluent limits that reflect the lowest effluent concentration that is feasible based on achieving the highest attainable condition for

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the receiving water. A person shall submit the proposed effluent limits and supporting data on an application for an individual nutrient variance under (3). A person who has an individual variance with effluent limits that are based on this section shall, in each subsequent triennial review of those limits conducted pursuant to 75-5-313(7), MCA, collect and submit water quality data to demonstrate whether the biological status of the receiving water continues to justify those effluent limits.

(5) The department shall review each application for an individual variance to determine whether a reasonable alternative, such as trading, a permit compliance schedule, a general variance, reuse, recharge, or land application would eliminate the need for an individual variance. If the department makes a preliminary finding that a reasonable alternative to approving an individual variance is available, the department shall consult with the applicant prior to making a final decision to approve or deny the individual variance.

(6) If, after consultation with the applicant, the department determines that no reasonable alternative to an individual variance exists, the department shall determine whether the information provided by the applicant pursuant to (2) adequately demonstrates that attaining the base numeric nutrient standards is not feasible. If the department finds that attaining the base numeric nutrient standards is not feasible, the department shall approve an individual variance, which will become effective and incorporated into the applicant's permit only after adoption by the department in a formal rulemaking proceeding.

(7) Based on the triennial review, and with respect to both general and individual variances, the department must issue draft findings and conclusions, provide public notice of the draft findings and conclusions, and solicit public comments. The notice must solicit comments on whether each variance should:

- (a) remain in effect;
- (b) be modified; or
- (c) be terminated.

(8) For general variances, the notice required in (7) must include general variance categories and the interim limits for each category, but it need not specify facilities included in each category.

(9) Based on the review and public comment, the department shall prepare final findings and conclusions and either:

(a) initiate rulemaking to amend or repeal the variance. At the conclusion of the rulemaking proceeding, the department shall submit the variance to the United States Environmental Protection Agency (EPA) for review pursuant to 40 CFR 131.21; or

(b) if the final findings and conclusions indicate that the interim limits should remain in effect and not be changed, provide the EPA with copies of the final findings and conclusions, supporting analyses, and the existing variance to the EPA for review pursuant to 40 CFR 131.20. If the EPA disapproves the findings and conclusions, the department shall, within 90 days from receipt of the disapproval, initiate rulemaking to repeal or modify the variance. At the conclusion of the rulemaking proceeding, the department shall submit the variance to the EPA for review pursuant to 40 CFR 131.21.

(10) A variance is not needed in situations where a person complies with the waste load allocation established in an approved TMDL.

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(11) The department adopts and incorporates by reference Department Circular DEQ-12B, entitled "Nutrient Standards Variances" (December 2013 edition), which provides procedures and requirements for nutrient standards variances. Copies of Department Circular DEQ-12B are available at the Department of Environmental Quality, 1520 E. 6th Ave., P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-201, 75-5-301, MCA
IMP: 75-5-313, MCA

REASON: The board of environmental review is initiating rulemaking to adopt base numeric nutrient criteria. The nutrient concentrations being proposed are generally low, particularly in the western region of Montana. In many cases, the concentrations are below the limits of current wastewater treatment technology, particularly for nitrogen. Therefore, when little or no stream dilution is available, dischargers will find it difficult or impossible to meet the standards. Senate Bill 95 (2009 Legislature) and Senate Bill 367 (2011 Legislature), now codified at 75-5-313, MCA, addressed the high cost and technological difficulties associated with meeting the nutrient standards in the short term. That statute allows dischargers to be granted variances from base numeric nutrient criteria in those cases where meeting the standards today would be an unreasonable economic burden or technologically infeasible. Variances from the standards may be granted for up to 20 years. Thus, 75-5-313, MCA, allows for the base numeric nutrient criteria to be met in a staged manner over time, as alternative effluent management methods are considered, nutrient removal technologies become more cost-effective and efficient, and nonpoint sources of nutrients are addressed. New Rule I, which incorporates proposed Department Circular 12B, is being proposed to implement 75-5-313, MCA. New Rule I and Circular 12B provide a process for granting variances and factors that the department will consider when deciding whether a person may be granted an individual nutrient standards variance.

New Rule I(1) makes clear that variances are available only after the time that the board adopts base numeric nutrient criteria. The department is required to adopt the statute-defined general variance categories and their associated concentrations and conditions into department rule by May 31, 2016. This rulemaking adopts those concentrations. After that date, the concentrations and conditions associated with each category may be modified by the department in a rulemaking proceeding.

New Rule I(3) requires the applicant to explore alternatives to discharging that may preclude the need for an individual variance. This implements 75-5-313(3), MCA.

New Rule I(4) addresses the situation in which water quality modeling for a river or stream segment indicates that greater reduction of one nutrient can achieve the same desired physical or biological condition as reducing both nitrogen and phosphorus. In such cases, requiring a point source discharger to immediately install sophisticated nutrient-removal technologies to reduce to general variance levels the concentration of the less-important nutrient may not be the most prudent nutrient control expenditure and would cause the discharger to incur unnecessary economic expense. Because this relates to economic expense, these situations

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may be addressed with an individual variance. Nutrient limitation status of water bodies can change due to a number of factors; for example, due to substantive nonpoint source cleanups upstream of the discharger. Therefore, status monitoring by dischargers receiving this type of individual variance is required per New Rule I(4). The potential impacts to the downstream water body, including impacts from the non-target nutrient, must be given consideration in all cases where New Rule I(4) is invoked. As described in section 2.2 of DEQ-12B, if a downstream water body will be impacted, some level of reduction on the target and/or non-target nutrient will likely be required, or the individual variance may not be granted.

New Rule I(5) requires the department to consult with the applicant regarding what the department perceives to be the availability of reasonable alternatives which would preclude the need for the individual variance. This consultation would occur before the department makes a final decision regarding the granting of the individual variance. Requiring consultation with the applicant assures that the reasonable alternatives decision is made based on complete information.

If it results that no reasonable alternative can be identified, New Rule I(6) requires the department to determine if the applicant has adequately demonstrated compliance. This implements 75-5-313(1), MCA.

New Rule I(7), (8), and (9) institute a review and public comment process that will be carried out every three years and describes the outcomes that may occur as a result. It also requires that, if the department determines that no change in variance limits is necessary, the findings and documentation be submitted to the Environmental Protection Agency and that, if that agency disapproves the finding, the department must institute rulemaking. This procedure is necessary to meet federal requirements under the federal Clean Water Act and regulations.

New Rule I(10) simply makes clear that, in the development of a TMDL, it may be determined that a point source discharger is an insignificant load of nutrients and, in such cases, there would be no need for the discharger to request a nutrient standards variance, because the current level of total nitrogen and total phosphorus removal is adequate.

New Rule I(11) adopts Department Circular DEQ-12B by reference. [Reason statement to be added]

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., _____, 2014. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. _____, attorney for the Department of Environmental Quality, has been designated to preside over and conduct the hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-

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mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by the department by _____ on _____.

8. With regard to the requirements of Chapter 318, Section 1, Laws of 2013, the department has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

JOHN F. NORTH
Rule Reviewer

BY: _____
TRACY STONE-MANNING, Director

Certified to the Secretary of State, _____, 2014.